



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 18, 2016

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Cynthia Tynan
Senior Attorney & Public Information Coordinator
The University of Texas System
201 West 7th Street, Suite 600
Austin, Texas 78701-2901

OR2016-25699

Dear Ms. Tynan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 634841 (OGC# 171831).

The University of Texas at El Paso (the "university") received a request for all vendor responses and the final license agreement related to a specified request for proposals. You claim portions of the submitted information are excepted from disclosure under section 552.139 of the Government Code. You also claim release of the submitted information may implicate the proprietary interests of Hobsons, Inc. ("Hobsons") and TargetX, LLC ("TargetX"). Thus, you state, and provide documentation showing, you notified the third parties of the university's receipt of the request for information and of their rights to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from TargetX. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Hobsons explaining why its information should not be released. Therefore, we have no basis to conclude Hobsons has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold the submitted information on the basis of any proprietary interest Hobsons may have in the information.

Next, we note the submitted information includes a contract for the purchase of services from a private vendor that is subject to the posting requirements in section 2261.253 of the Government Code. Section 2261.253(a) provides, in relevant part, as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

Gov't Code § 2261.253(a)(1). The contract at issue, valued at more than \$15,000, is between the university, which is a state agency, and a private vendor for the purchase of services, and the contract is not expired or completed. *See id.* §§ 2261.002(2) ("state agency" has meaning assigned by Gov't Code § 2151.002), 2151.002(3) ("state agency" includes university system or institution of higher education as defined by Educ. Code § 61.003). Accordingly, the contract at issue is required to be posted on the university's internet website. Although you seek to withhold portions of the information at issue under section 552.139 of the Government Code, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the university must release the contract at issue in its entirety.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.”¹ Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. TargetX states it has competitors. In addition, TargetX states release of some of its information would harm its ability to compete in the marketplace. After review of the information at issue and consideration of the arguments, we find TargetX has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information at issue, which we have marked, under section 552.104(a) of the Government Code.

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body’s or contractor’s electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov’t Code § 552.139(a), (b)(1)–(2). Section 2059.055 of the Government Code provides in part:

(b) Network security information is confidential under this section if the information is:

¹Although TargetX also raises section 552.101 of the Government Code for the submitted information, it provides no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume it no longer asserts this exception. See Gov’t Code §§ 552.305.

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You assert portions of the submitted information provide detailed information regarding the winning proposal's network vulnerabilities and capabilities that are now or will be in place. Further, you state this information pertains to network security and, if released, would make certain university data vulnerable to unauthorized access. Based on your representations and our review of the information, we conclude, with the exception of the information contained in the submitted contract, the university must withhold the information you have marked under section 552.139 of the Government Code.

We note portions of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the university must release the submitted contract in accordance with section 2261.253 of the Government Code. The university may withhold the information we have marked under section 552.104(a) of the Government Code. With the exception of the information contained in the submitted contract, the university must withhold the information you have marked under section 552.139 of the Government Code. The university must release the remaining information; however, any information subject to copyright may be released only in accordance with copyright law.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tim Neal', written in a cursive style.

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 634841

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)

JUN 20 2018 SH

At 9:07 A.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-16-006103

THE UNIVERSITY OF TEXAS	§	IN THE DISTRICT COURT OF
at EL PASO,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
KEN PAXTON, ATTORNEY GENERAL	§	
OF TEXAS,	§	
<i>Defendant.</i>	§	200th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

This is an open records lawsuit brought under the Texas Public Information Act (PIA), Texas Government Code chapter 552. All matters in controversy between Plaintiff University of Texas at El Paso (the University) and Defendant Ken Paxton, Attorney General of Texas (the Attorney General), have been resolved and the Parties agree to the entry and filing of an agreed final judgment. *See* Exhibit A (Settlement Agreement).

Pursuant to Government Code section 552.325(d), the Court shall allow the requestor a reasonable period of time to intervene after the Attorney General attempts to notify the requestor of the proposed settlement. The Attorney General represents to the Court and the Court hereby takes judicial notice that, in compliance with Government Code section 552.325(c), the Attorney General sent notice by certified mail to the requestor's last known address on May 23 , 2018, providing reasonable notice of this setting and of the requestor's right to intervene in the suit. *See* Exhibit B (proof of mailing). The requestor was informed of the proposed Settlement Agreement under which the University must withhold the information at issue in this lawsuit, as agreed upon by the Parties. The requestor was also informed of the right to intervene in this lawsuit to contest the withholding of the information. The requestor has not informed

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the Attorney General of an intention to intervene and no plea in intervention has been filed.

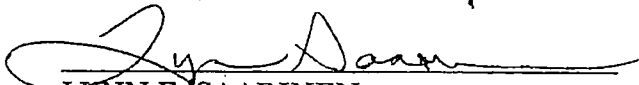
After considering the agreement of the Parties and the law, the Court is of the opinion that entry of this Agreed Final Judgment is appropriate, disposing of all claims between the Parties in this suit.

THE COURT THEREFORE FINDS AND ORDERS THAT:

1. The University and the Attorney General have agreed that, in accordance with the PIA and under the facts presented, the information at issue in this suit is confidential and excepted from disclosure pursuant to Texas Government Code section 552.139 (the Excepted Information);
2. The University must withhold the Excepted Information described in Paragraph 1 and must release the remaining requested information, to the extent it has not already done so;
3. All court cost and attorney fees are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between the University and the Attorney General in this cause and is a final judgment.

Signed this 20th day of June, 2018.

AGREED:




LYNN E. SAARINEN
State Bar No. 17498900
Assistant Attorney General
Financial Litigation and Charitable
Trusts Division
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 936-1659
Facsimile: (512) 477-2348
lynn.saarinen@oag.texas.gov

ATTORNEY FOR PLAINTIFF

Agreed Final Judgment
Cause No. D-1-GN-16-006103 (Noonan ORR)


JUDGE PRESIDING

TIM SULAK


MATTHEW R. ENTSMINGER
State Bar No. 24059723
Chief, Open Records Litigation
Administrative Law Division
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4151
Facsimile: (512) 457-4686
matthew.entsminger@oag.texas.gov

ATTORNEY FOR DEFENDANT

CAUSE NO. D-1-GN-16-006103

THE UNIVERSITY OF TEXAS	§	IN THE DISTRICT COURT OF
at EL PASO,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
KEN PAXTON, ATTORNEY GENERAL	§	
OF TEXAS,	§	
<i>Defendant.</i>	§	200th JUDICIAL DISTRICT

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Plaintiff the University of Texas at El Paso (the University) and Defendant Ken Paxton, Attorney General of the State of Texas (the Attorney General). This Agreement is made on the terms set forth below.

BACKGROUND

Pursuant to the Texas Public Information Act (PIA), Texas Government Code chapter 552, the University received a written request for records relating to a specified request for proposals. Upon receiving the request, the University sought an opinion from the Attorney General’s Open Records Division pursuant to Texas Government Code section 552.301. The Attorney General issued Open Records Letter Ruling OR2016-25699 (the Letter Ruling) in response to the University’s request. The ruling concluded, in part relevant to this lawsuit, that the entirety of a responsive contract must be released to the requestor pursuant to section 2261.253 of the Government Code. Believing it was prohibited under section 552.139 of the Government Code from releasing portions of the responsive contract, the University filed this lawsuit as permitted by section 552.324 of the Government Code, seeking declaratory relief from compliance with the Attorney

General's Letter Ruling. Those disputed portions of the responsive contract form the information at issue in this lawsuit (the "information at issue").

After the Letter Ruling was issued, the Legislature amended section 552.139 of the Government Code, which concerns cybersecurity. As amended, section 552.139(d) mandates a state agency redact information made confidential by section 552.139 when making a contract available to the public under section 2261.253 of the Government Code. Given the legislative amendment, the Parties now agree the University is prohibited from releasing portions of the contract determined to be public by the letter ruling.

Texas Government Code section 552.325(c) allows the Attorney General to enter into a settlement under which the information at issue in a lawsuit filed under the PIA may be withheld. The Parties wish to resolve this matter without further litigation.


TERMS

For good and sufficient consideration, the receipt of which is acknowledged, the Parties to this settlement agreement ("Agreement") agree and stipulate that:

1. The University represents that the information at issue pertains to network security and would, if released, make certain University data vulnerable to unauthorized access.
2. Based on the University's representation, the information at issue is confidential under section 552.139 of the Government Code.
3. The University must withhold the information at issue from the requestor.
4. The University must release the remaining portions of the requested contract not constituting the information at issue, to the extent it has not already done so.
5. The University and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney. The agreed final judgment will be presented to the Court for approval, on the uncontested docket, with at least 21 days' prior notice to the requestor. This Agreement will be attached to the agreed final judgment as "Exhibit A."


- 6. Pursuant to Tex. Gov't Code Section 552.325(c), the Attorney General will notify the requestor of this Agreement and of the right to intervene to contest this Agreement and the Court's entry of any agreed final judgment in the case.
- 7. If the requestor intervenes to contest this Agreement, a final judgment entered in this lawsuit will prevail over the Agreement, to the extent of any conflict.
- 8. Each party to this Agreement will bear its own costs, including attorneys' fees relating to this litigation.
- 9. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to the Agreement.
- 10. The University warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the University has against the Attorney General arising out of the matters described herein.
- 11. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against the University arising out of the matters described in this Agreement.
- 12. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

THE UNIVERSITY OF TEXAS AT EL PASO

By: 
 RICHARD ADAUTO
 Executive Vice President
 The University of Texas at El Paso
 500 West University Drive
 El Paso, TX 79968-0502

Date: 04/05/18

KEN PAXTON, ATTORNEY GENERAL OF TEXAS

By: 
 MATTHEW R. ENTSMINGER
 State Bar No. 24059723
 Chief, Open Records Litigation
 Administrative Law Division
 ATTORNEY GENERAL OF TEXAS
 P.O. Box 12548, Capitol Station
 Austin, Texas 78711-2548
 Telephone: (512) 475-4151
 Facsimile: (512) 457-4686
 matthew.entsminger@oag.texas.gov

Date: April 30, 2018